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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners,*

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

International Association of Machinists and Aerospace Workers (AFL-CIO), its District Lodge No. 91, and its Local Lodges Nos. 743 and 1746, pray that a writ of certiorari issue to review final judgments of the Supreme Court of Connecticut affirming awards of compensatory damages against petitioners in favor of re-

spondent totalling $1,424,001, plus interest from September 4, 1973 (A. 107a-109a).*

OPINIONS BELOW

The opinions of the Superior Court (Judge Gaffney) are not reported. They are printed in the separate Appendix ("A.") at pp. 1-27a (pre-trial memoranda), 29-55a (decision on liability) and 56-64a (decision on damages). The first decision of the Supreme Court of Connecticut, 161 Conn. 79, 285 A.2d 330, cert. denied on a question preserved but not presented herein, 404 U.S. 1016, is printed at A. 65-89a, amended at A. 91a.

The opinion of the Referee on remand from the Supreme Court of Connecticut is not reported. It is printed at A. 94a-106a. The second opinion of the Supreme Court of Connecticut, 90 LRRM 2249, is not yet officially reported. It is printed at A. 110-125a. The decision of that court denying reargument is printed at A. 125a.

JURISDICTION

The final opinion of the Supreme Court of Connecticut was entered on September 2, 1975. A timely motion for reargument was denied on October 7, 1975. (A.

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* "A." refers to the separately bound appendix to this petition containing the opinions and judgments below.

Under Connecticut practice, the record below is divided into two parts, one referred to as the "Record," containing pleadings, rulings on exceptions, findings, draft (rejected) findings, etc., and the other denominated "Appendix", containing narrative summaries of the testimony of plaintiffs[1] and defendants' witnesses ("A-P."; "A-D."). Because there were two trials and two appeals below, there are two records and several appendices. Occasional references to these documents will be designated "IR," "IIR", "IA", "IIA". The symbols "F" and "DF" refer to "finding" and "draft finding" respectively.

125a). By orders dated December 30, 1975, and January 29, 1976, Mr. Justice Marshall extended the time for filing this petition to March 5, 1976 (A. 126a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).[1]

QUESTIONS PRESENTED

1. In a federally protected strike accompanied by violence, may a court award damages to the employer for losses resulting from employee absence, where the court differentiates the amount of absence caused by tortious conduct from the amount caused by federally protected conduct only by accepting as "expert testimony" the speculative estimate of an employer official and

(a) that witness does not suggest, and the court does not find, any rational nexus between the witness' factual assumptions and his opinion;

(b) the witness' method is unknown to and unaccepted in any scientific discipline;

(c) the opinion is contradicted by the court's own findings and objective facts of record?

2. Does a judgment so grounded deny the defendants property without due process of law?

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[1] The Court below recognized that "defendants extensively and vigorously attack[ed] the [trial court's] findings and conclusions" regarding the percentage of employees absent due to defendants' tortious acts (A. 116a), which the court had held in its first opinion (A. 81a-82a) raised a federal question, as defendants had argued (Brief for defendants on the first appeal, p. 59). Petitioners' claim that entry of judgment on the basis of Mooney's estimates was also a denial of due process in violation of the Fourteenth Amendment was expressly raised at p. 40 of defendants' brief on the second appeal; see also defendants' brief on the first appeal asserting this claim with respect to acceptance of Northrup's opinion at the first damage trial, p. 88.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the Supremacy Clause of Article VI and the Due Process Clause of the Fourteenth Amendment of the United States Constitution and §§ 7 and 13 of the National Labor Relations Act, as amended, 49 Stat. 449, *et seq.*, 29 U.S.C. §§ 141 *et seq.* These provisions are reprinted at p. 1b, *infra*.

I. STATEMENT OF THE CASE

Introduction

This case involves an award of compensatory damages for losses assertedly suffered by respondent employer as the result of violence in the course of petitioner Unions' strike for new collective bargaining agreements. Recovery was awarded on the theory that the violence caused involuntary absenteeism which in turn caused economic injury to the Company in the form of wasted overhead, spoiled work, excess overtime and otherwise.[2] Since, under federal law, an employer may not recover for strike absence which was *not* tortiously caused (see pp. 32-33 *infra*), the central issue litigated below was the *amount* of absence which was caused by the violence.

The courts below decided that question solely on the basis of the *opinion* of one witness (a retired high official of respondent) who *estimated* how many employees were absent involuntary each day of the strike. It is our contention that description of the witness' avowed method of arriving at his estimates, and of record facts

[2] The formula for converting involuntary absences into dollars lost, and the application of that formula, were the subject of considerable controversy below (A. 113a-116a); however, we do not here challenge the State Court's resolution of these matters.

which bear on their reliability and indeed their rationality, establishes that the witness was engaged in sheer speculation; that his estimates are gross exaggerations; and that a judgment based thereon penalizes lawful strike conduct under the guise of compensating for involuntary absence. Indeed, we shall show that the amount of involuntary absence found below on the basis of this witness' opinion was far in excess of that which would be derived by a projection of the testimony of those absentees whom the Company put on the stand —a handpicked sample strongly biased in plaintiff's favor. We also submit that even if rights protected by federal statute were not involved, the judgment could not constitutionally stand because the sole testimony relied on is so far from being rationally probative that it cannot serve as "evidence" adequate, as a matter of due process of law, to support any judicial judgment.

A. The Strike

Respondent (hereinafter sometimes referred to as "plaintiff" or "the Company") is engaged in the manufacture of airplane engines and parts at several plants in Connecticut, including plants at East Hartford and Manchester (in the Pratt & Whitney Division) where the employees are represented by Local Lodge 1746 and at Windsor Locks and Broad Brook (in the Hamilton Standard Division) where the employees are represented by Local Lodge 743. The Local Lodges are affiliates of the International Association of Machinists and Aerospace Workers (hereinafter referred to as "the International"), and of its District Lodge 91. The Company is concededly an "employer engaged in commerce" and petitioners are "labor organizations" subject to the National Labor Relations Act. (A. 30a, 66a).

For many years prior to 1960, the Company and the respective Local Lodges were parties to collective bargaining agreements. The Lodge 1746 agreement expired on December 7, 1959, and the Lodge 743 agreement expired on April 21, 1960. A legal, federally protected strike for new agreements began June 8, 1960, and ended August 11, 1960 (A. 30a, 32a).

From June 8-13, the strikers engaged in mass picketing in front of the entrances to the employer's plants as well as assorted other acts of misconduct directed at individual non-strikers. On June 13, the state court approved and entered a stipulation (in which the Unions joined) prohibiting mass picketing and violence, but allowing picketing to continue. On June 16 a similar stipulation was entered by the federal court at the instance of the National Labor Relations Board, These stipulations limited the number of pickets and prohibited tortious conduct on the picket lines (state court) and also off the picket lines (federal court). After June 13 mass picketing ceased and, as authorized by the stipulations, picketing in limited numbers continued. Widespread publicity was given by television, newspapers and radio to the stipulations and to the restoration of order on the picket lines (A. 105a; II R. 64-65, D.F. 449-458; D.Ex. 34, 35, 36).

The record showed also that as early as June 10, foremen and employees who had returned to work informed other employees that it was safe to do so (II R. 65, D.F. 463). Newspapers covering the Hartford-Springfield-Middletown-New Britain-Manchester areas reported that picketing was orderly beginning June 11 (II R. 64, D.F. 453). By June 11, the State Police, assisting the local police, had brought the mass picketing under control (II R. 64, D.F. 452). Arrests of pickets for misconduct at or on the plant premises virtually ceased after June 13 (II R. 64, D.F. 457). The State Police were withdrawn on June 14 (II R. 65, D.F. 458). In anticipation of a strike, plaintiff had installed motion picture cameras at its plant gates, with which it recorded mass picketing and other misconduct. Although it kept some cameras in position after June 13, plaintiff stopped taking motion pictures after that day (A. 105a; II R. 64, D.F. 449,450). Whereas on Friday, June 10, 3,098 of approximately 16,200 bargaining unit employees reported to work at Pratt & Whitney and 365 of approximately 3,800 bargaining unit employees reported at Hamilton-Standard, on Monday, June 13, 4,273 and 522 reported at those plants. These numbers increased as follows in the next two weeks:

June 14 (Tues.) —P&W: 4,639; H-S: 598.
June 20 (Mon.) —P&W: 7,344; H-S: 1,208.
June 27 (Mon.) —P&W: 9,340; H-S: 1,634.
July 1 (Fri.) —P&W: 9,977; H-S: 1,744.

(IR. 285, 287 F. 634, 635.) A total of 4535 bargaining unit employees at Pratt & Whitney and 2019 bargaining unit employees at Hamilton-Standard remained out during the entire strike and registered as strikers to return to work at the end (IR. 244, F. 393, 394).

Although the courts below held that the Unions were liable only for the consequences of tortious acts on the picket lines and at the plant premises, and although these were isolated and sporadic after June 13 (A. 105a), the courts did not limit respondent's recovery through that date; they accepted the Company's contention that the after-effects of the fear induced by the

tortious acts prior to the injunctions continued through the week of July 1, 1960 (A. 105a-106a), *though not thereafter, (id.),* as the Company urged and as its witnesses had opined. Compare pp. 22-23 with p. 19, *infra.*

In determining the amount of absenteeism which was caused by violence directly and on this residual fear theory, the trial court did not rely on the testimony of absentees themselves, or on a projection based on a sample (representative or otherwise) of such absentees. Instead, it accepted, and relied exclusively upon the opinion of Morgan R. Mooney, the Company Personnel Director at the time of the strike, and its Vice President for Industrial Relations at the time of the first trial in these actions, see A. 99a, n. 2, A. 118a-119a. Mr. Mooney gave it as his opinion, and the trial court found, "that from June 9 up to and including July 1, the number of involuntary absences proximately caused by the tortious acts at or on the premises of the Pratt & Whitney plant were approximately 62,900 out of a total absences of the bargaining unit for the full period of the strike of approximately 266,000 or approximately 23.6%" and that at Hamilton Standard "[T]he involuntary absences numbered 17,600 out of approximately 91,000 during the strike period of 33 days or approximately 19.3%." (A. 105a, 106a).

We next describe the method by which Mooney arrived at these figures.

B. Mr. Mooney's Opinion and Its Deficiencies.

1. Mr. Mooney's Method.

Mr. Mooney described as follows the method and theory by which he arrived at his opinion as to the approximate number and percentage of involuntary absences each day of the strike (II R. 193, F. 268, Cf. II R. 72-78, D.F. 502-543).

1. The first figure in Mooney's calculations was an *estimated* number of "committed" or "hard core" strikers in each bargaining unit, by which he meant persons who would have stayed on strike for its duration, regardless of anything else (II A-P. 117). Because the infirmities in that estimate themselves fatally infect his opinion, and reveal in microcosm the methodological deficiencies of his whole approach, we describe and discuss that estimate in the margin.[3]

2. Mr. Mooney then subtracted the "committed strikers" from the number absent each day of the strike, a number not in dispute (A. 117a).

3. Mooney divided the remaining absentees into two categories: voluntary and involuntary due to defend-

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[3] He stated that he had based that estimate on (a) the number of union members who voted for the strike on May 26, 1960 (3488 at Pratt & Whitney and 1493 at Hamilton Standard); (b) the average number who were paid strike benefits during the strike, except for the first week of payments (as to which he considered the evidence unreliable) (3487 at Pratt & Whitney, 1298 at Hamilton Standard); and (c) the number who registered as strikers (4500 at Pratt & Whitney, 2000 at Hamilton Standard) at the end of the strike. He chose a number which he considered "reasonably related" to the aforesaid figures (II A-P. 108, 119). At Pratt & Whitney, he chose 3500; at Hamilton Standard, 1500 (II R. 193, F. 268).

This formula gives a certain patina of reason to Mooney's estimate, but closer inspection shows that the number chosen is merely the number of union members voting for the strike rounded off to the nearest hundred. There is nothing in Mooney's testimony, or elsewhere in the record—and the trier of fact did not find—that only union members who vote to go on strike will be committed to the strike if it occurs. Nor did the Company show, or the trier find, that Mooney's asserted formula for determining the number of committed strikers is predicated on industrial experience or otherwise validated. In fact, the number of strikers who did stay out to the end was far greater (see (c) above) and the trial court found that in the last month of the strike no one was absent because of violence (see p. 23 *infra*).

ants' tortious acts at the premises. In the voluntary classification he included all absences (voluntary and involuntary) for any reason other than fear or inability to cross the picket lines resulting from defendants' tortious acts at the plant premises. The number of *involuntary* absences chargeable to defendants was the ultimate fact to be determined. He formulated his opinion of *that* number on the basis of his "experience", by the following reasoning:

a. First, he *estimated* how many absences during the first three days of the strike were involuntary. This estimate was not shown to be anything more than speculation.

b. Involuntary absence thereafter he attributed to "residual fear" reinforced by tortious conduct on the picket line.

c. He *opined* that the volume and duration of such post-stipulation involuntary absence was substantial and that it continued throughout the strike. This opinion was not shown to be anything more than speculation .

d. He *estimated* the *amount* of that involuntary absence guided by the "trend lines", which showed an increasing number of absentees returning to work each day. He expressed his estimates as a percentage of the total absentees, less committed strikers, and as a percentage of the entire bargaining unit.

2. The Deficiencies in Mr. Mooney's Method.

a. *Mr. Mooney had no relevant experience or scientific aids.* Mr. Mooney's background and training consisted of his service in the federal government for two years as a labor compliance officer, seven years as

Connecticut Deputy Commissioner of Labor, in which position he had investigated a large number of strikes, and employment in labor relations capacities by the Company (personnel director during the strike and as vice president for industrial relations at the time of the first trial) (Note 2, A. 118a-119a).

However, nothing in Mr. Mooney's experience bore on the question of approximately how many or approximately what proportion of the strike period absences were caused by defendants' tortious conduct, or on any method for answering that question without input from the absentees themselves.[4] Nor did Mr. Mooney himself, although pressed, offer any connection between his experience and his opinion. In accepting Mooney's estimates through July 1, the trier and the Supreme Court of Connecticut (A. 105a and 121a) relied, in part, on Mooney's personal observation of the strike violence. They thus failed to distinguish between two different testimonial qualifications—observation and experience.[5] And finally, they took no account of the fact that Moon-

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[4] Before the 1960 strike, Mr. Mooney had talked to only 20 to 25 employees about their reasons for absence during a strike (II R. 192, F. 262).

Mr. Mooney had no prior experience in making estimates or ascertaining approximate percentages of the number of employees who were absent from work during a strike because of fear of violence or tortious conduct at the plant premises. He had no prior experience with a situation in which there was violence during the first few days of a strike and then a stipulation enjoining violence. (II R. 82, D.F. 573; II A-P. 132, A-P. 86). He had never interviewed any employees to discover their reasons for absence before or after such a stipulation (II 192, F. 263).

[5] The importance of the distinction and its implications are discussed in *Stephanofsky* v. *Hill*, 136 Conn. 379, 383, 71 A.2d 560, 562.

ey's observation was necessarily sporadic and, by his own admission, imperfect. (II R. 80-81, D.F. 560-566; II A-P. 129-130). Although Mooney relied on the number of cars he saw back up and leave during the first day of the strike, he described this as "100, 150, or possibly 200 cars" (II R. 80, D.F. 560); a margin of 100%.

b. *Mooney was biased.* The courts below treated Mooney's experience as the Company personnel director during the strike and subsequently as its vice president for industrial relations as affirmative qualifications (A. 99a, 118a-119a, n. 2 cont.). Their opinions do not show that they considered that his relationship to the plaintiff cast doubt upon the impartiality of his opinion.

c. *There is no logical nexus between the facts on which Mooney relied and his estimates.* Mooney was completely unable to describe how he proceeded from his factual assumptions to his ultimate numerical estimates of involuntary absence. Although Mr. Mooney was repeatedly asked to explain, his answers were uniformly evasive and unresponsive. At times he reiterated at length various aspects of the process described above. In the end, he declared simply that he knew how many employees were absent each day because of tortious conduct "on the basis of my experience. I reach that conclusion, that opinion, on the basis of my total experience." (II A-P. 127, 134-135.) It developed that what Mr. Mooney meant was that the estimates he made were, in his own "judgment", "reasonable":

> "* * * it was my judgment based on that experience, which I think is reasonably extensive, that this was a reasonable opinion for the absences

> proximately caused by the violence." (II A-P. 127-128).

To be sure, Mr. Mooney also testified:

> "* * * it is my view that *a reasonable probability is* that about half, in round figures, of the thirteen thousand [absentees on June 9 and 10] * * * were so affected by the intimidation and tortious conduct and the fear induced by them, that they remained away from work for that reason" (emphasis added; II A-P. 126-127).[6]

But he offered no explanation whatever of how he hit upon the number 6500, or to any reasoning which led him to conclude that 6500 was a more "probable" number than any other. Dr. Herbert Northrup, Chairman of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania (Note 2, A. 117a-118a), also gave his opinion as to the number of involuntary absences, purporting to follow the same method. (As will be discussed at pp. 19-20 below, his estimate of daily involuntary absenteeism differed substantially from Mooney's). He, too, was unable to describe any logical nexus between his premises and his conclusion. Particularly revealing is the following colloquy between the Referee and Dr. Northrup:

> "The Referee: What is your answer? Is there any scientific basis? Is there any principle that can be taught to others in a school of learning that would assist one in arriving at these conclusions?

[6] Cf. (II A-P. 134): "I'm not attempting to say anything with reasonable certainty. All I'm trying to do is to deliver myself of opinions with reasonable probability * * *."

> The Witness: Well, Your Honor, if I were asked this question in a classroom I would give an answer based upon my experience and background and try to help the student arrive at a conclusion. And that's the best I could do. I have testified there is nothing in writing or nobody of knowledge in the learned journals upon which we could rest." (II A-P. 103-104).

In fact, Dr. Northrup's method *cannot* be taught to others as he himself virtually admitted (II A-P. 86).

d. *Defendants' experts confirmed the absence of any logical nexus.* To aid the trial court in evaluating the character of the opinions proffered by the Company through Mooney and Dr. Northrup, defendants presented five distinguished behavorial scientists from various disciplines and a non-academic practitioner of industrial relations (A. 121a).[7]

Each testified that one could not tell, after studying Dr. Northrup's and Mr. Mooney's testimony, how they had arrived at the starting figure for their involuntary absence "trend lines" or how they came to their percentage figures (II R. 96, 97, D.F. 632, 636; II A-D. 23, 166-167). They discovered no method of determining how Dr. Northrup and Mr. Mooney weighted the

[7] Dr. Mason Haire, Alfred Sloan Professor of Management, Massachusetts Institute of Technology (industrial psychology); Dr. Albert Rees, Professor of Economics, Princeton (labor economics); Dr. Seymour Martin Lipset, Professor of Sociology, Harvard (labor sociology); Dr. William Gomberg, Professor of Management in Industrial Relations, Wharton School, University of Pennsylvania (industrial engineering); Dr. Hjalmar Rosen, Professor of Industrial Psychology, Wayne State University (industrial psychology); Wayne L. Horvitz, independent management consultant specializing in labor relations.

various factors they considered or how they combined those factors (II R. 96, D.F. 632).[8]

[8] Thus, Professor Haire testified:

> "[T]here's no logic between the total numbers of people employed and the percents [Dr. Northrup] comes to. There's just a gap that isn't filled with logic and I don't think that anyone else can go over the same steps he did and come out with the same number he did. He doesn't say how he got that. That's the sense in which I don't think I could come up to the same figures he did • • •. [T]here's no method given for handling those factors. [Dr. Northrup] doesn't tell you how he did it. He doesn't tell you what weight or what interaction, so that it's impossible to use those to come to any precise conclusion. One would have to think about these factors and then guess. That would be all, I think, I or • • • any other expert • • • could do." (II A.D. 17-18).

With respect to Mr. Mooney, Professor Haire testified (II A.D. 22):

> "I don't know how he came to the percentage figure any more than I know how Professor Northrupt came to the percentage figure. It's an interesting percentage figure but I don't see at the moment that it's convincing and I must say I don't think any expert is going to be able to produce a percentage figure on the basis of his expertise."

> "Q. • • • [T]he fact that he started with deducting the committed strikers, has it added substantially to your ability to arrive at a figure of what percentage of the balance were absent due to violence or fear?
> A. No, it hasn't added substantially to my ability to do it. It's another interesting approach but this doesn't seem to me to add substantially to the ability to pin it down • • • with reasonable probability." (II A.D. 22-23).

Mr. Horvitz testified:

> "[M]y problem is with putting any number on it, not with putting a specific number on it. I'm not impressed with the fact that Dr. Northrup reaches one number and somebody else reaches another number and which should you choose between the two. • • • [T]his one does not lend itself to quantification in my judgment." (II A-D. 57).

Mr. Horvitz also testified that he had the same difficulty with Mr. Mooney's analysis as he did with Professor Northrup's. The information relied on by Mr. Mooney did not constitute reasonable

Although he did not accept their testimony,[9] the trier did not purport in his opinion or findings to iden-

grounds for the formation of any opinion or judgment as to percentage of absence due to fear with a reasonable margin of error (II A-D. 55).

Professor Lipset testified:

> "* * * I would say he just had a paucity of the necessary information.
>
> Q. What's the consequence? What does his opinion amount to?
>
> A. It's a guess which he can make and anybody can make.
>
> I said, if I may, my own judgment, to come up with a fifty percent figure strikes me as a curious guess. You know, why fifty? Why not forty-five? Why not sixty? I don't see—I don't see any basis for coming—you know, when Gallup, for example, on the basis of—or anybody on the basis of a national random sample reports on the attitudes of a population, he will say, you know, within a certain margin of error, and the smaller the sample the greater the margin of error, and more questions, the greater the margin of error. There is no indication. It's just an offhand guess of fifty per cent in one case, thirty-three per cent in another. * * *
>
> * * *
>
> On the basis of what I have read * * * it seems evident to me that a certain unknown percentage, that, you know, intimidation was present and that there must have been some workers who did not go to work for shorter or longer periods because they felt intimidated either on the picket line or elsewhere. * * * On the other hand, what that percentage was * * * is something which I just don't have enough information * * *." (II A-D. 65, 68-69, 88-89).

See also Professor Gomberg, II A-P. 160-161, 166, 168; Professor Rees, II A-P. 137-138, 140-141; Professor Rosen, II A-D. 39.

[9] The Referee "did not accept the testimony of [defendants' experts] with respect to the opinions given by Professor Northup and Mr. Mooney" (II R. 201, F. 294), but he did not identify what portions of their testimony he did not accept or explain why he rejected it. The trier's rejection cannot have been based on the theory that they were not sufficiently expert in their own fields, for he found that they constituted "a group of eminent authorities in the field of labor, economics, social science, including psychology, as well as statistics" (A. 101a). See also A. 104a-105a, where the trier affirmatively relied on their testimony.

tify any logical nexus between Mooney's premises and those of his conclusions the trier accepted. Nor did the Supreme Court of Connecticut supply this critical omission.

In response to an inquiry from the Referee, Professor Gomberg distinguished between an estimate derived by inference from data which will logically support it, and a "subjective,.intuitive," guess, or speculation (II A-D. 168). Although directed to Dr. Northrup's testimony, Gomberg's reasoning applies as well to Mr. Mooney.

> "There is a technique of logic which gives us the laws of inference. And the laws of inductive logic in turn which are based on the precepts of mathematical statistics, give me a sanction for generalizing from the particular to the general under certain circumstances. I see no evidence of that procedure on [Dr. Northrup's] part, that justifies his quantitative figures."

In answer to the Referee's question, "When is * * * deduction pure speculation; when is it reasonable?", Professor Rees stated (II A-D, 145-146): "When the maker doesn't have sufficient facts to enable him to draw an inference with any accuracy." See also, Professor Lipset, II A-D. 65, 74; Professor Haire, II A-D. 16-18 (Dr. Northrup's percentage estimate "was just a wild guess").

e. *Defendants' experts established that Mooney's method is not recognized in any profession.* Neither Mr. Mooney nor Dr. Northrup nor any other witness testified that the Mooney-Northrup "process" or "method" of estimating the number and percentage of involuntary absentees is "accepted in his

branch of learning" (II A-P. 86) and none of defendants' experts had ever seen or heard of it before. Defendants' experts, whose collective expertise covers all scientific disciplines relevant here, agreed that *the only* source from which an inference could be drawn as to a reasonably approximate amount or proportion of involuntary daily absence is data based upon the accurately ascertained subjective motivation of absent individuals (A. 122a; II R. 92, D.F. 605; II A-D. 5-6, 17, 29, 32-34, 38, 51-52, 54-55, 89, 137-138, 140). This could be probed through each absentee individually, or by representative sampling, through interviewing, or by testimony (II R. 63, 92, D.F. 445, 606; II A-D. 147-148, 82-83), with results of varying degrees of accuracy. They testified uniformly that except by examining the employees' subjective reasons there is *no probative source of evidence* to support *any* inference as to the reasonably approximate quantum of involuntary absence an any day or all days of the strike (II R. 92, D.F. 605, 607, II A-D. 6-7, 16-19, 27, 29, 36, 37, 49-51, 56-57). Without such evidence, "there is no field of expertise that will make possible other than a speculative response" (II A-D. 10).[10]

[10] Dr. Northrup inadvertently corroborated this testimony in explaining why he was unable to make an approximation of the number of employees who returned to work each day because they could no longer stand the economic privation (rather than) the ebbing of fear (II A-P. 92):

> "Because I did not interview and find out the economic situation for each individual worker or reasonable sample thereof who returned to work on each particular day."

3. Objective Evidence Bearing on the Reliablity of Mooney's Method.

a. *The extent of variance between the estimates of Mr. Mooney and Dr. Northrup.* The trier properly observed (A. 105a) that

> "[I]n estimating the number of involuntary absences, the daily total in the early period was greater in Dr. Northrup's opinion than the number indicated by Mr. Mooney, while in the latter period of the strike, it was the reverse."

But he did not focus on, and therefore failed to draw the appropriate conclusion from, the *extent* of the variance between them. To demonstrate the variances we have plotted their estimates of daily involuntary absence at Pratt & Whitney and Hamilton Standard on Charts 3 and 4, annexed, with accompanying tables, *infra.*

For example, Dr. Northrup estimated that on June 13, there were 7822 involuntary absentees at Pratt & Whitney (II R. 188, F. 248). Mr. Mooney estimated that on that date there were 5500 (II R. 194, F. 269). Dr. Northrup's estimate is 42 percent higher than Mr. Mooney's (Table 3A, *infra.*) [11]

Even greater discrepancy appears when their estimates of involuntary absence at the end of the strike are compared. For example, Dr. Northrup estimated that at Pratt & Whitney, on July 29, there were 577 involuntary absentees (II R. 188, F. 248). Mr. Mooney estimated 1000 (II R. 195 F. 269), 73 percent more

[11] Dr. Northrup estimated that on that day there were 1914 involuntary absentees at Hamilton Standard (II R. 189, F. 249). Mr. Mooney estimated 1500 (II R. 195, F. 272). Dr. Northrup's estimate is 28 percent higher than Mr. Mooney's (Table 4A, *infra*).

(Table 3A, *infra*).[12] At Hamilton Standard there was never a difference of less than 15 percent, and for the dates between July 15 and the end of the strike the difference ranged from 129 percent to 171 percent (Table 4A, *infra*). At Pratt & Whitney there were, after the first two days seven days on which the difference was less than 10 percent but it was already as high as 46 percent and 47 percent during the first full week of the strike and after the 4th of July it was less than 15 percent only twice and ranged as high as 95 percent (Table 3A, *infra*).

b. *The trend lines established by plaintiff's involuntary absence witnesses prove that Mooney's are fictitious exaggerations.* At the first damage trial the Company produced 212 employees handpicked by its counsel, each of whom had been absent for one or more, but less than all, days of the strike, who testified that their absence had been involuntary.[13] At the second damage trial the Company introduced a transcript of 73 of these witnesses and one hundred and thirty-five additional hand-picked witnesses. (A.116a, 101a-102a). Company counsel did not claim that these witnesses had been selected by any randomizing technique or that the universe interviewed included all employees still on the Company's payroll who had

[12] Dr. Northrup estimated that at Hamilton Standard on August 8 there were 200 involuntary absentees (II R. 188, F. 248). Mr. Mooney estimated 500 (II R. 196, F. 272), 150 percent more. (Table 4A, *infra.*)

[13] The trial court found that the testimony of these witnesses established "a clear pattern of lost work days directly and proximately attributable to the illegal acts of the defendants" (A. 57a) but failed to describe what the pattern was.

been absent during the strike;[14] he did not even deny that the witnesses had been selected for the purpose of maximizing an impression of extended involuntary absence. No explanation was ever offered for the Company's failure to despose or call all available strike period absentees whose absence the Company claimed was involuntary, or even to call or despose an unbiased, random, sample of all absentees still in its employ.

The Mooney involuntary absence estimates and his involuntary absence "trend lines" are in conflict not only with the facts, but with the "trend line" or "pattern", p. 20, n.13 *supra,* established by collation of the testimony of the Company's winesses. Of those who testified that their absence was involuntary, 77 percent at Pratt & Whitney and 75 percent at Hamilton Standard had returned to work by June 20 and 93

[14] Of the 16,000 employees in the Pratt & Whitney Division bargaining unit at the time of the strike 6800 remained on the Company's payroll at the time of the 1972 retrial. Of these 6800, 3800 had been absent one or more days but not for the entire duration of the strike, and 1600 had stayed out during the entire strike (II R. 139, F. 10). Of the 4350 employees in the Hamilton Standard Division bargaining unit at the time of the strike, 1550 remained on the payroll at the time of the 1972 retrial. Of these 1550, 1000 were absent one or more days but not for the entire duration of the strike, and 500 had stayed out during the entire strike (II R. 139, F. 11).

The Connecticut courts ultimately found that no absence after the week ending July 1 was involuntary (A. 117a, 105a.) Thus, by restricting the universe to employees who had been absent less than all days of the strike, rather than including "all who had refrained from work" (A. 87a), the Company excluded thousands of voluntary absentees who were easily available. This deliberate skewing precludes drawing from its witness "sample" any inference favorable to the Company as to the percentage of absence which was involuntary.

percent at Pratt & Whitney and 90 percent at Hamilton Standard had returned by June 27.[15]

Even disregarding the exaggeration inherent in the Company's biased witness collection, by comparison with it, Mooney's estimates of involuntary absence between June 17 and July 1 are vastly inflated, as appears from Charts 1 and 2, *infra*, and the following table:

	Pratt & Whitney				Hamilton Standard			
				Plaintiff's				Plaintiff's
Date	Mooney	Estimate	Witness	Sample	Mooney	Estimate	Witness	Sample
	No.	% *	No.	% *	No.	% *	No.	% *
6/9	6500	100	113	100	1500	100	20	100
6/13	5500	85	88	78	1500	100	20	100
6/17	4500	69	50	44	1100	73	9	45
6/24	2600	40	11	10	800	53	4	20
7/1	1800	28	4	3.5	600	40	1	5

* In this Table the figures in the number columns for June 9 equal 100%. Subsequent figures in each % column show the percent for that date as compared with the June 9 figure.

c. *The Referee's Own Decision Fatally Undermines Mooney's Estimates.*

The Referee found that:

> "Both Dr. Northrup and Mr. Mooney testified that the effects of * * * fear engendered by the tortious acts of the defendants at the gates of the Pratt & Whitney and Hamilton Standard Plants were a proximate cause of involuntary absences of a portion of the plaintiff's direct labor employees down to the end of the strike." (A. 104a).

[15] Only 4 out of 113 at Pratt &Whitney and 2 out of 20 at Hamilton Standard were still absent on July 1, and the Referee refused to believe that the absence of even this handful after that date was attributable to fear.

The Referee discredited this testimony. He said (*id*):

> "Taking into consideration the injunction of June 13, 1960, a similar injunction issued by the U.S. District Court of this State, the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police; the widespread publicity both on T.V., Radio and the newpapers of the issuance of the injunctions, I am not persuaded that the after effects of the fear induced by the tortious acts of the defendants caused involuntary absences, after the week ending July 1, 1960."

Nevertheless, the Referee adopted Mr. Mooney's estimate of the amount of strike absence *up to July 1* which was involuntary. In doing so, he overlooked that his own finding established that Mooney had virtually ignored and grossly undervalued the fear-dissipating effects of the events of June 11 to July 17, on which the Referee relied. That error did not merely infect and invalidate Mooney's estimates of involuntary absence after July 1, it similarly infected and invalidated his estimates before July 1.[16] It did so for several reasons.[17]

First, Mooney used the same facts, assumptions and method of computing daily involuntary absence

[16] The same is true, of course, of Northrup's estimates.

[17] Mooney's method is further impeached by the first decision of the Supreme Court of Connecticut. Mooney had given his opinion with "reasonable probability" as to how long the strike would have lasted had there been no violence, but the court found that this opinion was too speculative to be accorded "significant weight" (A. 84a-85a). Mooney gave no explanation as to why his quantification of involuntary absence was more reliable than his estimate of strike duration, which was based on that quantification (A. 84a-85a), and neither the Referee nor the Supreme Court in its second opinion explained the difference.

throughout the strike. There is no rational basis for believing that his judgment on this matter has any worth whatsoever if he so completely misunderstood the dynamics of the situation that he ascribed fear as the reason for absence of 1800 employees (at Pratt & Whitney alone) as of July 4, whereas the trier of fact found that *none* of the absences on that date were involuntary.

Second, Mooney's estimates of pre-July 1, involuntary absence were based on the assumption that 1000 of the registered strikers at Pratt & Whitney and 500 at Hamilton Standard had been absent involuntarily throughout the strike. (II R. 83, 196 D.F. 577, 595, F. 272). In other words, the starting point of his analysis was that although more than 4500 employees registered as strikers (that is, were absent during the entire strrike) at Pratt & Whitney and 2000 at Hamilton Standard, only 3500 at Pratt & Whitney and 1500 at Hamilton Standard were "committed" strikers who had voluntarily gone on strike and stayed out voluntarily for its duration. See p. 9, n. 3 *supra.* By his findthat none of the absences from July 1 to the end of the strike were involuntary (A. 105a), the trier destroyed the starting point of Mooney's analysis and every single figure thereafter.

Third, reasoning backwards in time from the Referee's finding that 1800 absentees at Pratt & Whitney and 600 at Hamilton Standard whom Mr. Mooney counted throughout as involuntary were not absent, as of July 4, involuntarily, it follows that their absence from June 9 to July 1 likewise cannot be attributed to fear. For, there was no testimony by Mooney (and no other evidence in the record), and the Referee did not find, that anything occurred on the weekend be-

tween July 1 and July 4 to transform 2400 "involuntary" absentees into "voluntary" absentees. The finding that their absence after July 1 was not involuntary therefore required deducting 1800 at Pratt & Whitney and 600 at Hamilton Standard from Mooney's daily involuntary absence totals each day *prior* to July 1.

Adjustment of the "trend lines" to show disappearance of involuntary absence by July 1 is plotted in Charts 1 and 2 and accompanying Table 1A and 2A, *infra.*

In sum, the Referee's own findings strip Mooney's pre-July 1 daily involuntary absence figures of their only supporting structure.[18]

II. THE HISTORY OF THIS LITIGATION.

A. The Liability and First Damage Trials.

The case was assigned for trial to Gaffney, J. The trial was bifurcated into liability and damage stages. After the liability trial the court found defendant unions liable for violence at the plants' premises, primarily by mass picketing during the first few days of the strike before the June 13 stipulation and also for various vicious and lawless acts, referred to as "night

[18] Even if, notwithstanding all of the foregoing, the Mooney "method" were given credence, that is, if one were to assume that there were involuntary absence trend lines as postulated by Mooney, but reduced by 1800 at Pratt & Whitney and 600 at Hamilton Standard, the percentage of involuntary absence at Pratt & Whitney would be diminished from 23.6 percent to 12.1 percent (II R. 202, F. 299), and at Hamilton Standard from 19.3 percent to 8.1 percent (II R. 202, F. 301). Plaintiff's damages at Pratt & Whitney would thereby be reduced from $979,200 (II, 212, F. 355) to $508,337, and at Hamilton Standard from $444,811 (II R. 212, F. 356) to $172,682.

riding", which were committed by individuals away from any of plaintiff's plants. (A. 27a-55a, 75a-80a).

In first damages trial the Company presented various theories including, *inter alia,* that the unions were responsible for its entire strike loss; that they were responsible for the loss after the point at which the strike would have ended but for violence; and that they were responsible for all involuntary absences. As to the latter point, the Company asserted that it was impossible to separate involuntary absences from voluntary absences, but that if it was possible, the burden of separation was on the defendants (A. 81a-82a). The Company did not seek to prove involuntary absenteeism by testimony of the employees themselves, although they obviously knew best their own motivation—which was the point at issue. Nor did the Company offer a representative sample of such employees; that is, a sample chosen on a random basis. Rather, it offered some employees, chosen by Company counsel, who had returned to work before the end of the strike and who testified that their absence was involuntary. These, the Company argued, established a "pattern," from which the trier could draw "inferences." Lastly, the Company offered two "experts," Dr. Herbert Northrup and Mr. Morgan R. Mooney, who estimated the amount of involuntary absenteeism on each day of the strike and testified that the strike would have ended sooner but for the violence. They attributed the continuation of substantial involuntary absence after the third week of the strike to fear engendered by the "night riding" (I R. 293, F. 651).

Judge Gaffney adopted the opinion of Dr. Northrup that, absent violence, the strike at Pratt & Whitney would not have lasted beyond three weeks and that at Hamilton Standard it would not have extended

beyond four to six weeks (*id.*). He also accepted Northrup's estimate that at the end of the three-week period fear was the reason that 50 per cent of the employees did not report to work, a figure which Northrup reduced to 25-33⅓ per cent by the end of the strike; he also believed Northrup's estimate that at the end of the strike 20 per cent of the Hamilton Standard work force failed to report due to fear (A. 57a-58a).

B. The First Opinion of the Supreme Court of Connecticut.

Both parties appealed to the Supreme Court of Connecticut. That court sustained the liability determination except with respect to incidents not connected to union officers and incidents away from the plants, which it held could not be attributed to petitioners (A. 79a-80a). The court held that because of this error in the liability determination, a new trial on damages was necessary. It then instructed the trial court on how to proceed on the retrial (A. 80a-81a). It held that proof of how long the strike would have lasted absence violence is unnecessary; plaintiff could obtain damages for involuntary absence at any time during the strike (A. 85a). With respect to proof of that issue, the Court said (A. 87a):

> "The court made its determination * * * mainly on the basis of the testimony of [Dr. Northrup] * * * who was permitted, over the defendants' objection, to state his opinion as to the percentage of the plaintiff's employees who stayed away from their employment involuntarily, and the reception of this evidence by the court is assigned as error by the defendants. While expert opinion would be relevant provided the court accorded it persuasive weight as was done in these cases, other methods of determining the element of involuntary absence of equal or greater weight might be resorted to such as a representative sampling of employees who refrained from work. The evi-

dence to be relied on for arriving at a reasonable approximation is for the court to decide."

C. The Second Damage Trial.

On remand, the case was assigned to the Hon. Joseph E. Klau, State Referee. Despite the invitation of the Supreme Court of Connecticut, plaintiff did not offer to produce a sample of available absentees *selected at random,* that is one which was representative in a statistically meaningful sense. Again, the Company offered opinion testimony of Dr. Herbert Northrup and Mr. Mooney which challenged as unscientific guesswork, pp. 14-18, *supra,* petitioners' witnesses.

The Referee construed the above quoted portion of the opinion "to mean that the testimony of Dr. Northrup and Mr. Mooney were admissible, and that it could be accorded persuasive weight if in the opinion of the trier it was entitled to it" (A. 101a).

He decided to accord it "persuasive weight" because (absent any evidentiary support and contrary to the testimony of all defendants' expert witnesses):

> "In view of the practical and legal problems of obtaining reliable data from a statistically representative sample of absentees either during or immediately after the strike, the State Referee, acting as the Court, finds that at no time during or after the strike was plaintiff able to obtain reliable data from a statistically representative sample of absentees for introduction into evidence." [19] II R. 201-202, F. 297.

[19] Plaintiff had adduced no evidence of any "practical and legal problems of obtaining reliable data" from all or a statistically representative sample of absentees immediately after the strike, when virtually all absentees were available and memories were fresh. Nor did it adduce any evidence that "difficulties" of any kind were the reason it did not then undertake a representative sampling. The portion of the above quotation beginning "The State" and ending "time" is inadvertently omitted from the Appendix, A. 119a.

However, the Referee did not find that it was impractical for plaintiff to have presented as witnesses at the retrial a sample of available absentees selected at random.

As stressed at pp. 22-25, *supra,* the Referee found that after July 1, 1960, no employee was absent either because of the aftereffects of fear induced by defendants' tortious conduct before the stipulations, or because of tortious conduct thereafter (A. 105a).

The portion of plaintiff's strike loss attributable to defendants was arrived at by obtaining the percentage of involuntary absence days compared to total strike absence days derived from Mr. Mooney's estimate of involuntary absence days to and including July 1, and applying that percentage to the total strike loss alleged by the Company (A. 105a-106a).

D. The Second Decision of the Supreme Court of Connecticut.

The Supreme Court of Connecticut approved the Referee's acceptance of Mooney's speculative estimates. It reached that result by eschewing or misapplying rules indispensable to effectuation of the limitation acknowledged in its first opinion, namely, that state courts are bound to limit recovery to the consequences of only those strike absences which are proved by competent, probative, evidence to have been caused by "tortious acts" (A. 82a, 81a).

In its first opinion (A. 85a), the court had cited *Stephanofsky* v. *Hill,* 136 Conn. 379, 384-385, 71 A.2d 560, 563, for the proposition that expert opinion, if speculative, cannot be relied on as probative.[20]

[20] In *Stephanofsky* the court held the opinion of an expert as to the cause of an accident speculative because the facts relied on did not exclude the possibility of other causes. Under that ap-

In its second opinion, the court substituted a much earlier, far less sophisticated, statement governing admissibility of expert testimony:

> " 'The true test of the admissibility of [expert opinion] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.' Taylor v. Monroe, 43 Conn. 36, 44, cited with approval in Schomer v. Shilepsky, —Conn. (37 Conn. L. J., No. 4, pp. 10, 12). Implicit in this standard is the requirement, later articulated, that the expert's knowledge or experience must be directly applicable to the matter in issue. Siladi v. McNamara, 164 Conn. 510, 513-14, 325 A.2d 277." (A. 120a-121a).

On this basis, the court held Mooney and Northrup qualified "to render opinions regarding [the extent of] involuntary absenteeism during the strike" (A. 117a, 119a). However, it failed to identify any relationship between their "observations" and "experience" on the one hand and capacity to quantify the motive for non-witness absence on the other, pp. 11-12, 13-14 *supra*. The court apparently ruled as a matter of law that the trier properly rejected the testimony of defendants' experts

proach the Mooney estimates "should have been excluded as a guess" (136 Conn. at 385, 386, 71 A.2d, at 563, 564), for it is not even asserted that the facts cited by the court (A. 121a) logically *exclude the possibility* that causes other than misconduct for which petitioners were held responsible (such as strike support or participation, unwillingness to alienate strikers, a "wait and see" attitude or sheer timidity) motivated all but a handful of the non-witness absences they classified as "involuntary."

that the facts on which Mooney and Northrup relied are not rationally sufficient to infer the motivation (in refusing to cross the picket lines) of the thousands of individuals to whom Mooney and Northrup had not spoken and about whose personal motivation they knew nothing. Nor did the court identify any logical nexus between the assertedly supporting matters they "took into account" (A. 121a) and their qualification to quantify.

The only apparent explanation for permitting an opinion as to quantum of involuntary absence to be derived in this fashion is the following:

> "The fact that the subjective motivation or state of mind, in this case the absentees' fear, could be inferred by the trier from other facts is a well settled rule of evidence. Frequently the only method of establishing what lay in the mind of a person when he acted is through such an inference." (A. 122a)

Incomprehensibly, the court *denied* that the Referee had "reject[ed] Mooney's opinion as to the number of persons who were still affected by fear after July 1" (A. 123a),[21] and likewise denied that the Referee had rejected Northrup's estimates of pre-July 1 involuntary absence insofar as they were inconsistent with Mooney's

[21] The court's assertion (A. 122a), that the Referee merely "placed more reliance" on Mooney's opinion with respect to the cause of pre-July 1 absences is refuted by the very portion of the Referee's opinion quoted in the next paragraph. The Referee found that Mr. Mooney was of the opinion that after July 1, the daily involuntary absences were limited to those who were afraid to return to work "until the strike was over". (A. 124a) In the face of the Referee's finding (A. 105a) that *there were no such absentees*, the court's reference to Mooney's "explanation" of the "leveling off of [involuntary] absences from July 1 to the termination of the strike" as "significant" passes understanding.

(A. 122a). In holding that the Referee's finding that fear was not the cause of any absences after July 1 (pp. 22-23, *supra*), "did not affect or destroy the weight which the court gave to Mooney's testimony and opinion concerning that period between the commencement of this strike and July 1, 1960" (A. 124a), the court ignored the necessary implications of that finding.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UNDERMINES THE CONGRESSIONALLY PROTECTED RIGHT TO STRIKE BY AWARDING DAMAGES FOR CONDUCT NOT PROVEN TO BE PROXIMATELY CAUSED BY ILLEGAL CONDUCT.

A. When this Court last had before it a judgment for damages imposed upon a union for violence during a strike the Court said:

> "Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic peace. Thus, in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, we read our prior decisions as only allowing 'the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order,' *id.*, at 247, and noted that in *Laburnum*
>
> > 'damages were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants . . . " as defined by the traditional law of torts. . . . Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.' *Id.*, 248, n. 6, at 249." (*Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-730.)

The Court took special note that in prior cases in which relief by way of damages or injunction had been approved, the Court had satisfied itself that the damages had been limited to those proximately caused by violence, and that only violent conduct had been enjoined. The Court also pointed to *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, where it had modified an injunction issued against a background of violence to permit peaceful picketing:

> "'[t]hough the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing . . . .'" (355 U.S. at 139, quoted at 383 U.S. at 730-731.)

Additionally, the Court analogized to *Teamsters Union* v. *Morton*, 377 U.S. 252, where

> "a similar analysis was applied to permit recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated primary strike activity could not be recovered." (383 U.S. at 731, n. 17.)

In sum, "[w]here the consequences of peaceful and violent conduct are separable, * * * it is clear that recovery may be had only for the latter" (383 U.S. at 732).

The courts below did not openly defy the principles established in those cases, but they did the next worst thing. They allowed respondent to recover an enormous damage award based not on probative evidence but on speculation that a large percentage of employee absence during the strike was caused by illegal conduct. Because, as detailed in our Statement and further discussed below, that speculation does not satisfy the requirements of logical inference, it fails to provide the requisite assurance that the huge damage award predicated upon it is "restricted to the 'damages * * * caused by wrongful conduct chargeable to the defendants . . .'," *(Gibbs, supra,* 383 U.S. at 730 quoting *Garmon* and *Laburnum).* Indeed, this record compels the conclusion that defendants have been charged for damage largely resulting from successful exercise of "a weapon of self-help permitted by federal law" *(Morton,* 377 U.S. at 259)—the strike and (after the first few days) peaceful picketing designed to induce employees to respect the federally permitted and protected picket lines. Cf. *Gibbs, supra,* 383 U.S. at 732, n. 18.

Ironically, and unbearably, the federally protected reaction of employees—not to work during the strike—has been transmuted by the alchemy of "expert opinion" into a financial liability of the Union to the employer. Unless state courts are to be allowed thus to transform strike absence from a federally protected right to a springe of union liability, the judgment below should be reviewed and reversed.

B. In *Letter Carriers* v. *Austin,* 418 U.S. 264, 282, it was said:

> "The Court has often recognized that in cases involving free expression we have the obligation,

> not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law. [Citations omitted]
>
> 'We must "make an independent examination of the whole record," *Edwards* v. *South Carolina,* 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' *New York Times Co.* v. *Sullivan; supra,* at 285.
>
> While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under the federal labor laws. This obligation, derived from the supremacy of federal labor law over inconsistent state regulation, *Hill* v. *Florida ex rel. Watson,* 325 U. S. 538 (1945); *Teamsters Local 24* v. *Oliver,* 358 U. S. 283, 295-296 (1959), requires us to determine whether any state libel award arising out of the publication of the union newsletter involved here would be inconsistent with the protection for freedom of speech in labor disputes recognized in *Linn* [v. *Plant Guard Workers,* 383 U.S. 53]."

Here too, the Court has an "obligation, derived from the supremacy of federal labor law over inconsistent state regulation" to review the record to insure that the judgment below does not constitute a forbidden intrusion on the exercise of the federally protected right to strike, to picket and to respect peaceful picket lines. For, as *Gibbs* clearly indicates, the necessity of this Court's guarding federally protected labor conduct against potentially inconsistent damage awards is not confined to protected speech. Indeed, *Linn* equates the balancing state interest in awarding damages for defamation with the state interest recognized in *La-*

burnum and its progeny in awarding damages to preserve the peace (see 383 U.S. at 61-62.)

Directly applicable too is the observation in *Linn,* also repeated in *Letter Carriers:*

> "We think it important again to point out * * * that 'in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers.' *Linn,* 383 U. S., at 64. It is for this reason that the Court in *Linn* held that '[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial.' *Id.,* at 65-66". (418 U.S. at 287, n. 17, this Court's emphasis in *Letter Carriers.*)

Of course, state trial courts have a like *duty,* not to enter excessive judgments in non-jury cases; and state appellate courts have a *duty* to set such excessive judgments aside, for they share the Supremacy Clause obligation to avoid such a "threat to the stability of labor unions." But unless this Court reviews such unprecedented judgments as this one, where it appears that the state courts have shirked their duty, the duty is a meaningless form of words.

C. Acceptance of Mooney's estimates as "expert opinion" makes a shambles of the law of evidence. "Whatever may be the general formulation, *the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway* v. *United States,* 319 U.S. 372, 395. Above all, it flouts what

Wigmore properly describes as one of two axioms of admissibility:

> "*None but facts having rational probative value are admissible.* This principle is indeed axiomatic, for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion." *1 Wigmore, Evidence* 289 (3rd ed., 1940, emphasis in original.)

We earnestly submit that where a witness gives an opinion without being able to explain the reasoning process by which he reaches it and is unable to demonstrate a logical nexus between his factual premises and his conclusion, his opinion has no probative value. To offer such an opinion to a trier of fact is not to engage in rational persuasion, but to invite a leap of faith. Here, neither the witness himself, nor respondent's learned counsel on brief, nor the courts below have ever explained the connection between the facts and figures on which the estimates are assertedly premised and the estimates themselves.

Applicable to Mr. Mooney is the Sixth Circuit's rationale for rejecting the testimony of another expert witness: "How he arrived at this figure is unexplained. He applied no mathematical formula. It appears to be a figure arbitrarily taken out of thin air." *Volasco Products* v. *Fry Roofing Co.,* 308 F.2d 383, 392 (6 Cir.)

D. The court below invoked the rule of damages declared in *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 563 (reaffirmed in *Bigelow* v. *RKO*

Radio Pictures, 327 U.S. 251, 264), that damages may be calculated "as a matter of just and reasonable inference, although the result be only approximate" (A. 115a-116a, 120a, 122a-123a). But it disregarded the essential corollary of that rule, that "even where the defendant by his own wrong has prevented a more precise computation, [which is *not* the case here, see pp. 40-44 *infra*] the jury may not render a verdict based on speculation or guesswork." *Bigelow*, 327 U.S. at 264. See also *Story*, 282 U.S. at 563. The decision below is thus inconsistent with the principle it purports to apply, and with those decisions, which are faithful to limitations inherent in the *Story-Bigelow* rule, such *Volasco, supra*, and *Coleman Motor Co.*, v. *Chrysler Corp.*, 525 F.2d 1338, 1352 (3 Cir. 1975), where the court, accepting *Story*, said:

> "damage figures advanced by plaintiff's expert may be substantially attributable to lawful competition. In the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."

A judge is no more entitled than a jury to attribute losses to unlawful rather than lawful causes on the basis of speculation.

E. The reasoning of the Supreme Court of Connecticut in sustaining the trial court's reliance on Mooney's opinion only introduced new errors into the analysis. We confine ourselves to the most significant:

1. The court held Mooney's opinion admissible on the theory that

> "subjective motivation or state of mind, in this case the absentees' fear, could be inferred . . . from other facts . . ." (A. 122a), quoted at p. 31, *supra*.

Heretofore, an inference of subjective motivation from "other facts" has been permitted only where those "other facts" have consisted of probative *behavior by the individual whose motive is in question*. Here there is *no* such behavior by which the motive of one non-witness absentee can be distinguished from another's. The rule that motive may legally be inferred from probative circumstantial evidence does not guarantee the existence of such evidence in every case or license an inference as to motive where there is no evidence which permits a *reasonable* inference. In this case absence is a neutral fact, and to infer *motive* from its mere *existence* is the essence of forbidden speculation. Possible reasons far absence during a strike are so numerous that the question whether any particular individual's absence was due to fear of violence, or solidarity with the union, or fear of social ostracism, or hope for economic gain if the strike is successful, is known only to the individual absentee. It follows that the only competent evidence is either the testimony of absentees themselves or of a representative sample.[22]

2. The court below recited at length Mooney's experience in industrial relations. But it failed to take

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[22] Mooney did not (A. 121a), because he could not, quantify, for example, the "employees who did not want to alienate fellow employees": he had not spoken to any of the strikers to learn how they felt. Cf. p. 18, n. 10, *supra*. But if he could not quantify those who were voluntarily absent for that reason, how could he know that any employees whose absence he attributed to fear were not absent because they "did not want to alienate their fellow employees"? And even if it be assumed, without any scientific basis, that the proportion of individuals in a group who were motivated by fear is uniquely subject to quantification, then how could Mooney distinguish (and thus quantify) those who were absent because of fear created by tortious conduct *on the premises*, if he could not quantify the "employees who were absent because of fear created by *tortious acts committed off the premises*", for which the court below had ruled the defendants were not liable (A. 79a-80a)?

account of the patent bias inherent in Mooney's long-time employment by the plaintiff, and his specially adversary relationship to the union as personnel director during a bitter strike, and later as vice president for industrial relations. Surely, such bias should have caused the court, if not to discredit his subjective estimates, at least to discount them. Contrast: *Norland* v. *Washington General Hospital,* 461 F.2d 694, 699 (8 Cir. 1972); *Thurber Corp.* v. *Fairchild Motor Corp.,* 269 F.2d 841, 845 (5 Cir. 1959); *Luria Brothers & Company* v. *United States,* 369 F.2d 701, 713 (Ct.Cl. 1966). See *II Wigmore Evidence,* p. 646 (3rd ed. 1940); *IIIA id.,* pp. 786-788.

Moreover, like plaintiff and the trial court, the Supreme Court of Connecticut failed to point to anything in Mooney's experience which qualified him to give the particular opinions which the state courts accepted, although those courts conceded that nexus between the witness' expertise and the precise question at issue is crucial to qualification, p. 30, *supra.* Cf. *Jenkins* v. *United States,* 307 F.2d 637, 646 (D. C. Cir., *en banc*), and particularly the concurring opinion of then Judge Burger, *id.* at 647 and 649-650.

3. In its first opinion the Supreme Court of Connecticut invited plaintiff to prove its damages on remand by use of a representative sample of all absentees (pp. 27-28, *supra*). The Company chose not to do so, proffering only a skewed group of involuntary absentees and the estimates of Mooney and Northrup (*id.*). In its second opinion, the court approved the trier's determination that because of "practical and legal obstacles * * * plaintiff was at no time able to present a statistically valid sample" (A. 119a), and his acceptance of Mooney's estimates as a substitute therefor (p. 28, *supra*). This, too, was grave error:

a. Assuming, *arguendo,* that a representative sample of all strike period absentees was unobtainable, and that a representative sample of all absentees available at the time of the second damages trial would not have provided an acceptable basis for inference as to the quantum or percentage of strike absence which was involuntary, acceptance of Mooney's opinion would still be unjustified. There is no rule of law which allows a plaintiff to maximize his recovery on the basis of incompetent evidence simply because no competent evidence is available. To allow him to do so is not only to dilute his burden of proof, but to reach a judicial judgment which has no rational basis. As the Court of Appeals for the Seventh Circuit said recently:

> "It is true, of course, as Hoefferle points out and as we have held above, that damages need not be calculated with mathematical precision. It is also most unfortunate that the deaths of Clarence and Dolly Hoefferle may have the effect of precluding the recovery of damages which rightfully belong to their company. But as disagreeable as this result may be, it does not vitiate the rule that damages must be proved with at least a reasonable degree of certainty, [citation omitted] which we do not here perceive."[23]

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[23] *Hoefferle Truck Sales* v. *Divco-Wayne,* 523 F.2d 543, 553 (7 Cir., 1975). The Court continued:

> "The admitted fact of damages, moreover, as presumably established by the liability trial, will not suffice to prove the amount of damages. [citations omitted]
>
> The evidence, in short, created little more than a speculative inference of the extent of Hoefferle's injury, and it was therefore properly excluded."

So it is here.

Even more striking is Judge Learned Hand's opinion, reaching what he called "the lamentable result" of denying a plaintiff recovery for profits which the defendant had obtained in violation of an injunction, because the defendant *had destroyed* the records which would have made possible computation of his profits. *Sunbeam Corp.* v. *Golden Rule Appliance Co.,* 252 F.2d 467, 471-472 (2 Cir.) (concurring opinion). Judge Hand approved the reasoning of the early case of *Yesbera* v. *Hardesty Mfg. Co.,* 166 Fed. 120, 123 (6 Cir.): "Of course if, in the absence of the better proof, there is still nothing of substance left on which the court can lay hold, there is no help, and the plaintiff must endure his loss." And Judge Hand added: "Much as we should like to find a way by which to compute the profits, we cannot do so * * *." (252 F.2d at 472.)

b. The trial court's impossibility finding, quoted at p. 28, *supra,* is contrary to the expert testimony (II R. 94, D. F. 624, II R. 201, cf. F. 295), and, in any event, is irrelevant to the question of why plaintiff elected to present a biased witness sample and speculative expert opinion in lieu of a random witness sample selected from all currently available absentees.

> "Proof of necessity [for using a representative sample] does not require a showing of total inaccessibility to proof of the facts desired to be shown, but the offeror must show the impracticability of making his proof by conventional methods. [Footnote omitted.]" Manual for Complex Litigation, 1 Part 2, *Moore's Federal Practice* (2d ed.), pt. 2.712, p. 97.

The "conventional method" in this case required plaintiff to produce for cross-examination each employee whose absence plaintiff claimed was involuntary. *Automobile Workers* v. *Russell,* 356 U.S. 634; *NLRB* v. *Madison Courier, Inc.,* 472 F.2d 1307 (D.C. Cir., 1972). As we have seen, plaintiff did not prove that this was "impracticable." But assuming, *arguendo,* that it was, plaintiff was required to prove causation by the best evidence reasonably obtainable. If the hearsay objection is to be overcome because large numbers are involved, the condition precedent necessarily must be proof of compliance, as fully as possible, with judicially approved techniques and procedures for random, *i.e.,* unbiased, sampling. Since no legal or practical problems prevented plaintiff from presenting a witness sample chosen at random from the proper universe of available absentees, rather than a collection of hand-picked examples, that is what it was required to do. Projection from such a sample, at the least, would have tended to corroborate or contradict the opinion testimony.

The present situation is therefore identical to that in *Galloway* v. *United States,* 319 U.S. 372, where this Court emphatically disapproved another attempt to substitute "expert * * * inference" for available evidence:

> "The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel), to present no evidence or perhaps to

withhold evidence readily available * * * and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

"In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. *No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand.* To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof." *Id.* at 386-387, footnote omitted, emphasis added.

4. The courts below determined that the employee witnesses were not a representative sample "of all the employees employed in 1960, in a statistical or scientific sense" (A. 119a), and assumed that that justified totally disregarding it. They refused to acknowledge, as defendants had urged, that while the sample was unrepresentative, it permitted, and indeed required, the drawing of an inference *against plaintiff*. The inference is that absentees whom plaintiff did not call would have given testimony that was no more (and most probably less) favorable to plaintiff than the absentees it did call. Since even the biased sample proves that the witness' estimates were gross exaggerations (pp. 21-22, *supra*), the inference is inescapable that a random sample would have proved that involuntary absence was a miniscule percentage indeed.

II. THE DECISION BELOW DEPRIVED DEFENDANTS OF PROPERTY WITHOUT DUE PROCESS OF LAW

This Court has held, in a variety of contexts, that a judicial or administrative determination which, without *some evidence,* deprives a person of liberty or property, is a denial of due process of law. *Thompson* v. *Louisville,* 362 U.S. 199, anticipated in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 246-247, and *United States ex rel. Vajtauer* v. *Commissioner,* 273 U.S. 103, 106, and frequently followed. See *e.g., Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 94-95; *Johnson* v. *Florida,* 391 U.S. 596; *Douglas* v. *Buder,* 412 U.S. 430; *Vachon* v. *New Hampshire,* 414 U.S. 478; cf. *Boilermakers* v. *Hardeman,* 401 U.S. 233, 246; *Wood* v. *Strickland,* 420 U.S. 308, 323, n. 14.

We submit that because the conclusion that the Company suffered losses caused by defendants' tortious activity in the amount of over $1,400,000 is not based on any rationally persuasive "evidence" (see most particularly pp. 36-37 *supra*), the judgment denies petitioners due process of law. At the very least, acceptance of Mooney's estimates raises a serious due process question which this Court should consider.

Of course, the Company did proffer testimony, which the courts below accepted *as if it were rationally probative evidence,* to justify the damage award. But so did the parties who had prevailed below in the cases this Court reversed for lack of evidence. In *Thompson* itself the Court examined the record and determined that while there was testimony, "[t]here simply is no semblance of *evidence from which any person could reasonably infer*" (362 U.S. at 205, emphasis added) the essential element of the offense charged. And in *Schware,* although the Board of Bar Examiners had relied on

"certain facts in the record which raised substantial doubts about his moral fitness to practice law", 353 U.S. at 240 (described *id.* at 240-246), this Court concluded that "[t]here is no evidence in the record which *rationally justifies a finding* that Schware was morally unfit to practice law" (*id.* at 246-247).[24]

CONCLUSION

The courts below relied on Mooney's speculative estimate to determine the issue (decisive under federal law) of how much strike absence was involuntary. "No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap * * *" (*Galloway* v. *United States,* 319 U.S. 372, 387). This petition for certiorari should be granted.

Respectfully submitted,

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[24] We are aware that the *Schware* case has been vigorously criticized, Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration,* 44 ABAJ 229 (March, 1958), with particular attention to this Court's review of the record, *id.* at 230-231. However, *Schware* was followed in *Thompson* and its method has survived, see e.g., *Vachon, supra,* where this Court made an "independent examination of the trial record" and determined that the only evidence proffered "was in no way probative of the crucial element of the crime * * *" (414 U.S. at 479-480). The Supreme Court of Connecticut was bound by these precedents, and its disregard of them necessitates this Court's consideration.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

" * * * or shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

NATIONAL LABOR RELATIONS ACT, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or potection * * *."

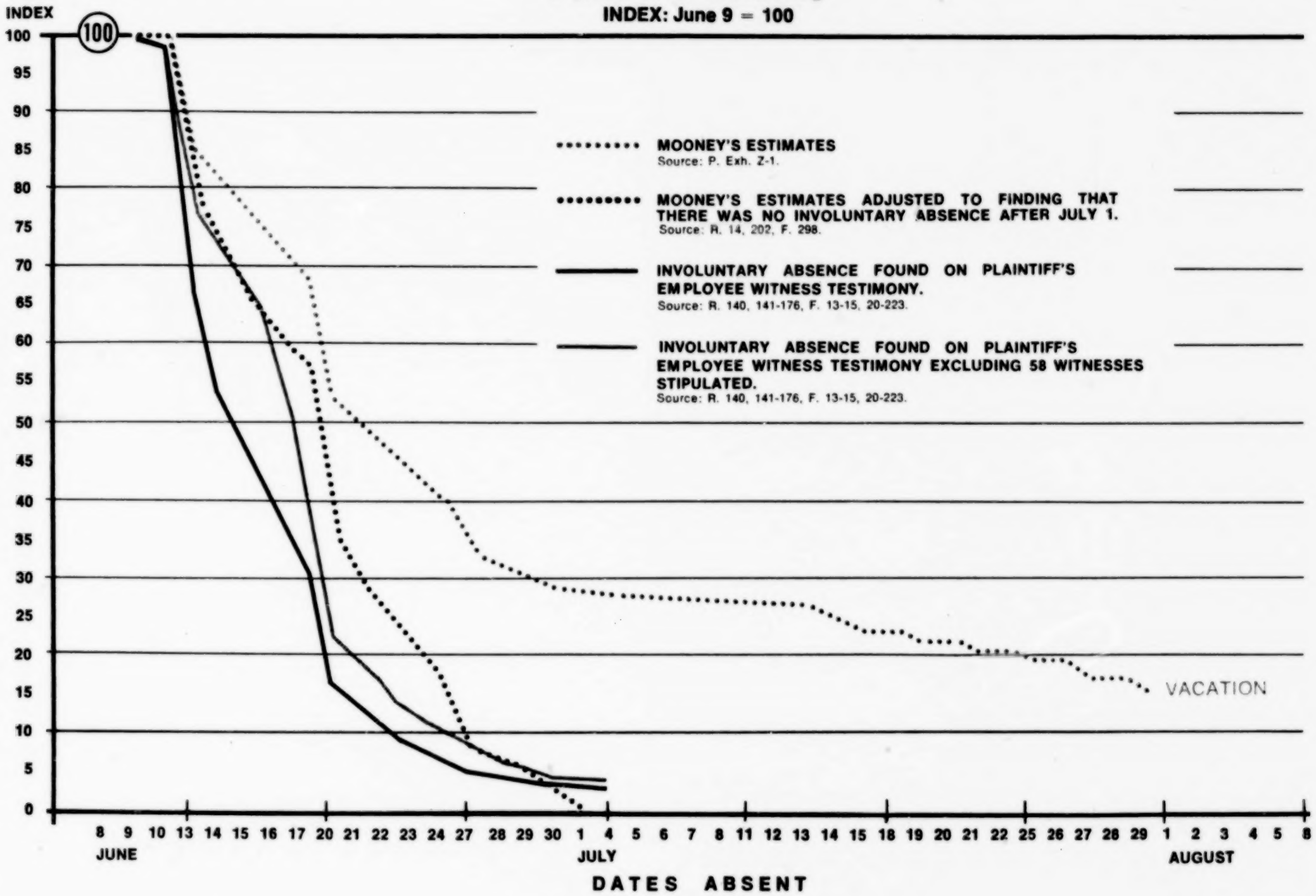
"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

1

TREND LINES JUNE 9th THROUGH JULY 1st

Pratt and Whitney

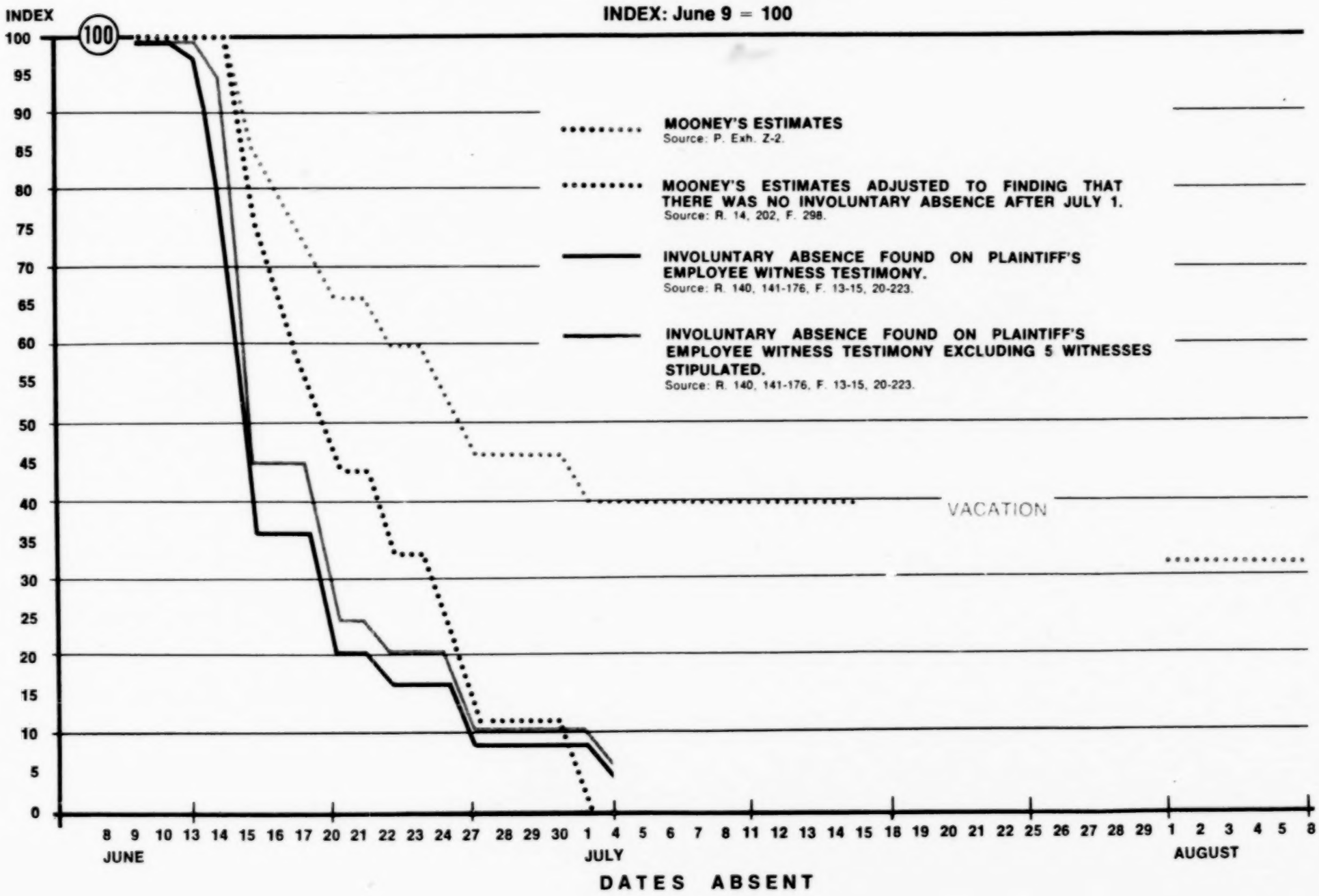
INDEX: June 9 = 100



REFERENCE TABLE 1A -- CHART 1 -- PRATT & WHITNEY
NUMBER AND INDEX OF INVOLUNTARY ABSENCE
JUNE 9th THROUGH JULY 29th

	1		2		3		4		5	
	Mooney's Estimates		Mooney Estimates Adjusted (less 1800)		Involuntary Absence Found (Plaintiff's Employee Witnesses)		Excluding 58 Stipulated Witnesses		Mooney's Adj. Est. Fitted to Index of Employee Witnesses	
June	Number	Index	Number	Index	Number	Index	Number	Index	Number	Index
9	6500	100	4700	100	165	100	113	100	4700	100
10	6500	100	4700	100	162	98.2	112	99.1	4615	98.2
13	5500	84.6	3700	78.7	105	63.6	88	77.9	2989	63.6
14	5200	80.0	3400	72.3	84	50.9	82	72.6	2392	50.9
15	4900	75.4	3100	66.0	75	45.5	75	66.4	2139	45.5
16	4700	72.3	2900	61.7	63	38.2	63	55.8	1795	38.2
17	4500	69.2	2700	57.4	50	30.3	50	44.2	1424	30.3
20	3500	53.8	1700	36.2	27	16.4	27	23.9	771	16.4
21	3200	49.2	1400	29.8	22	13.3	22	19.5	625	13.3
22	3000	46.2	1200	25.5	16	9.7	16	14.2	456	9.7
23	2800	43.1	1000	21.3	13	7.9	13	11.5	371	7.9
24	2600	40.0	800	17.0	11	6.7	11	9.7	315	6.7
27	2200	33.8	400	8.5	8	4.8	8	7.1	226	4.8
28	2100	32.3	300	6.4	7	4.2	7	6.2	197	4.2
29	2000	30.8	200	4.3	5	3.0	5	4.4	141	3.0
30	1900	29.2	100	2.1	4	2.4	4	3.5	113	2.4
July										
1	1800	27.7	0	0	4	2.4	4	3.5	113	2.4
4	1800	27.7	0	0	4	2.4	4	3.5	23,382	
5	1800	27.7								
6	1800	27.7								
7	1800	27.7								
8	1800	27.7								
11	1800	27.7								
12	1700	26.2								
13	1700	26.2								
14	1600	24.6								
15	1500	23.1								
18	1500	23.1								
19	1400	21.5								
20	1400	21.5								
21	1300	20.0								
22	1300	20.0								
25	1200	18.5								
26	1200	18.5								
27	1100	16.9								
28	1100	16.9								
29	1000	15.4								

TREND LINES JUNE 9th THROUGH JULY 1st
Hamilton Standard

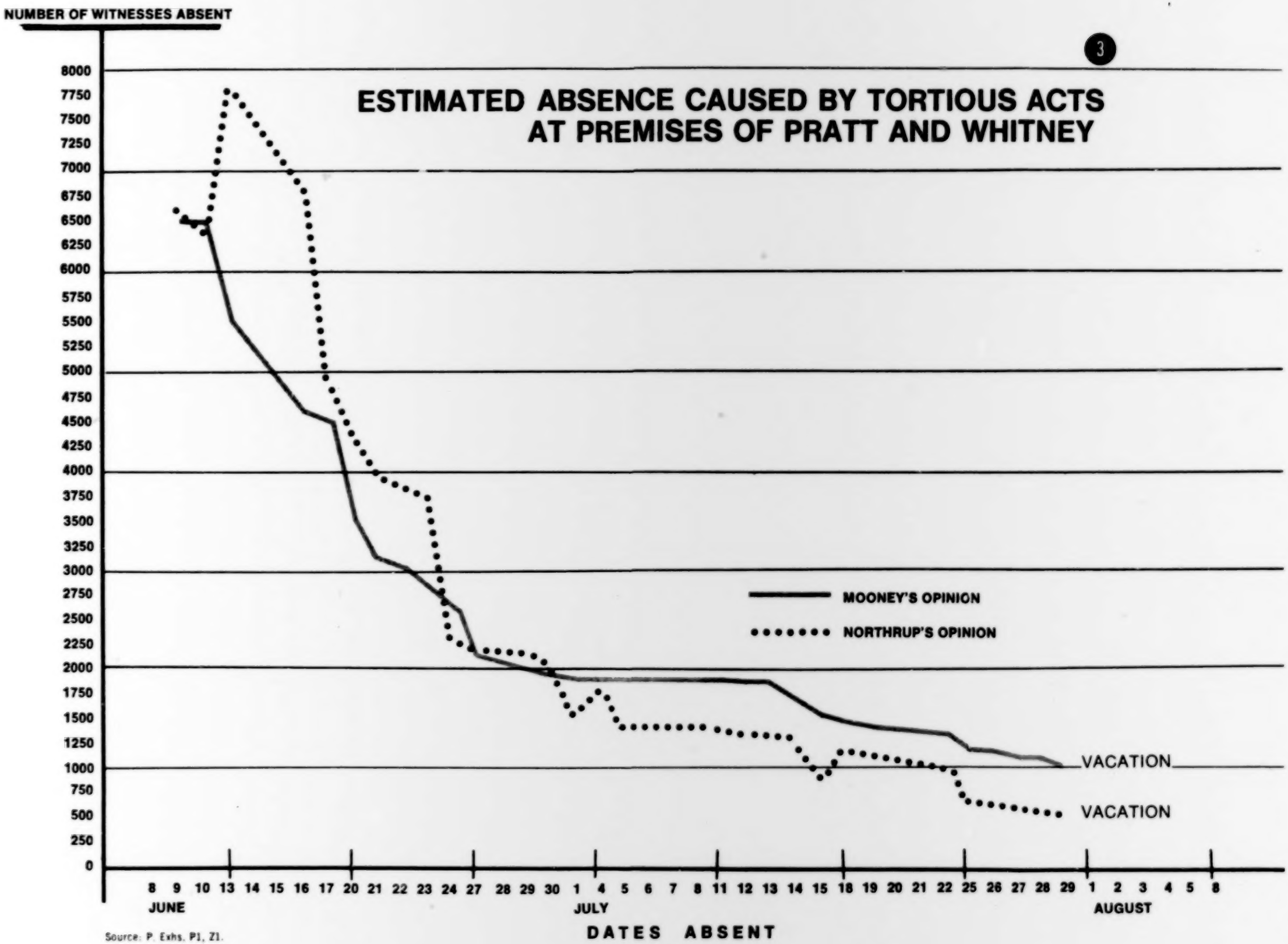


REFERENCE TABLE 2A - CHART 2 - HAMILTON STANDARD
NUMBER AND INDEX OF INVOLUNTARY ABSENCE
JUNE 9 THROUGH AUGUST 8

	1		2		3		4		5	
	Mooney's Estimates		Mooney Estimates Adjusted (600 less)		Involuntary Absence Found (Plaintiff's Employee Witnesses)		Excluding 5 Stipulated Witnesses		Mooney's Adj. Est. Fitted to Index of Employee Witnesses	
June	Number	Index	Number	Index	Number	Index	Number	Index	Number	Index
9	1500	100	900	100	25	100	20	100	900	100
10	1500	100	900	100	25	100	20	100	900	100
13	1500	100	900	100	24	96.0	20	100	864	96
14	1500	100	900	100	20	80.0	19	95	720	80
15	1300	86.7	700	77.8	9	36.0	9	45	324	36
16	1200	80.0	600	66.7	9	36.0	9	45	324	36
17	1100	73.3	500	55.6	9	36.0	9	45	324	36
20	1000	66.7	400	44.4	5	20.0	5	25	180	20
21	1000	66.7	400	44.4	5	20.0	5	25	180	20
22	900	60.0	300	33.3	4	16.0	4	20	144	16
23	900	60.0	300	33.3	4	16.0	4	20	144	16
24	800	53.3	200	22.2	4	16.0	4	20	144	16
27	700	46.7	100	11.1	2	8.0	2	10	72	8
28	700	46.7	100	11.1	2	8.0	2	10	72	8
29	700	46.7	100	11.1	2	8.0	2	10	72	8
30	700	46.7	100	11.1	2	8.0	2	10	72	8
July										
1	600	40.0	0	0	2	8.0	2	10	72	8
4	600	40.0	0	0	1	4.0	1	5	5508	
5	600	40.0								
6	600	40.0								
7	600	40.0								
8	600	40.0								
11	600	40.0								
12	600	40.0								
13	600	40.0								
14	600	40.0								
15	600	40.0								
Aug.										
1	500	33								
2	500	33								
3	500	33								
4	500	33								
5	500	33								
8	500	33								

3

ESTIMATED ABSENCE CAUSED BY TORTIOUS ACTS AT PREMISES OF PRATT AND WHITNEY



Source: P. Exhs. P1, Z1.

TABLE 3-A

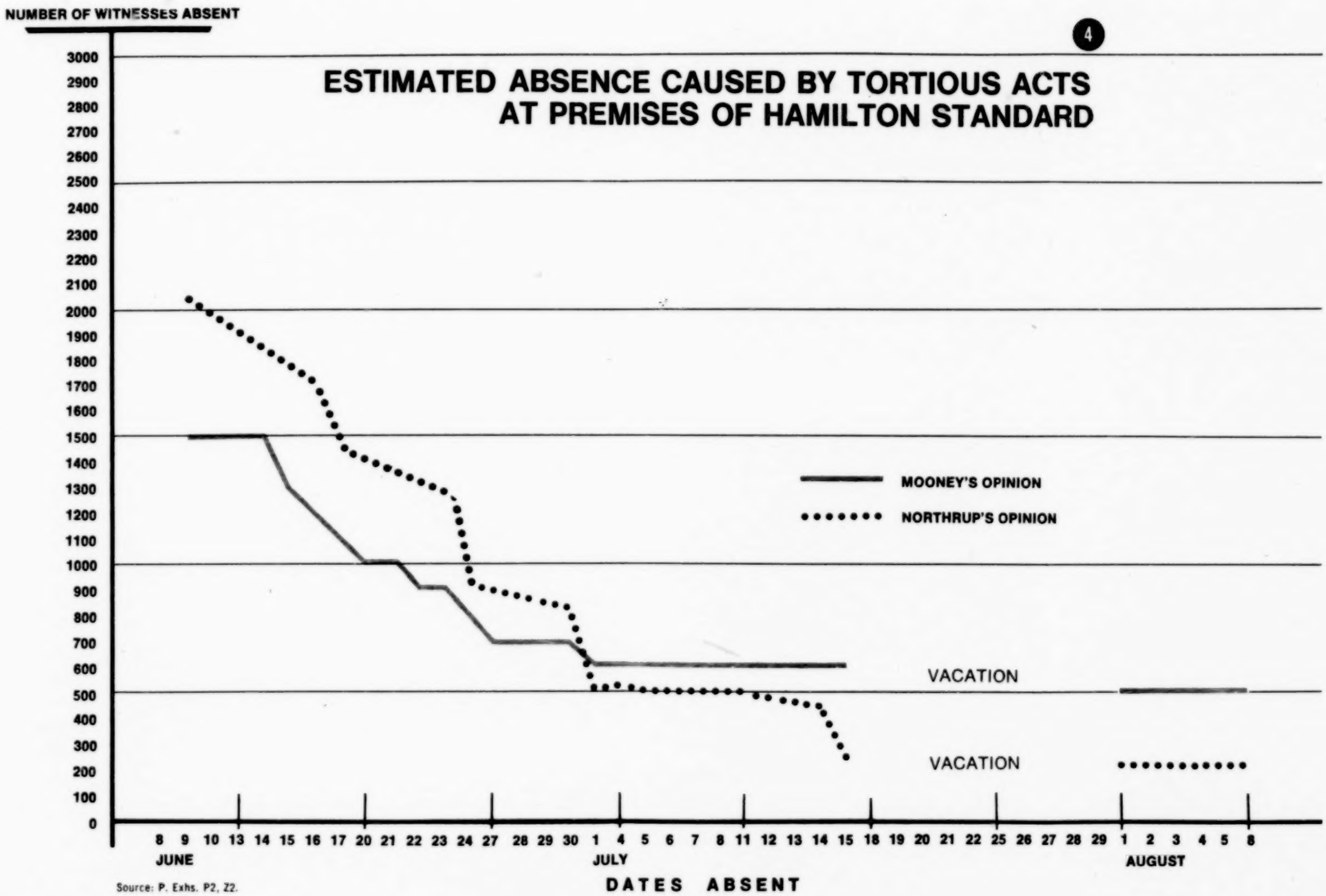
PRATT & WHITNEY

DISCREPANCIES BETWEEN ESTIMATES OF MR. MOONEY AND DR. NORTHRUP

June	Mooney Estimates	Northrup Estimates	Difference	Cost of Difference At $15.57 Per Absence	% of Difference
9	6500	6671	171	$ 2,662.47	3
10	6500	6651	151	2,351.07	2
13	5500	7822	2322	36,153.54	42
14	5200	7578	2378	37,025.46	46
15	4900	7213	2313	36,013.14	47
16	4700	6852	2152	33 506.64	46
17	4500	4905	405	6,305.85	9
20	3500	4328	828	12,891.96	24
21	3200	4075	875	13,623.75	27
22	3000	3890	890	13,857.30	30
23	2800	3717	917	14,277.69	33
24	2600	2373	227	3,534.39	9
27	2200	2218	18	280.26	1
28	2100	2159	59	918.63	3
29	2000	2120	120	1,868.40	6
30	1900	2075	175	2,724.75	9
July 1	1800	1505	295	4,593.15	16
Subtotal (June 9-July 1)			14296	$ 222,588.72	
4	1800	1727	73	1,136.61	4
5	1800	1469	331	5,153.67	23
6	1800	1461	339	5,278.23	23
7	1800	1442	358	5,574.06	25
8	1800	1419	381	5,932.17	27
11	1800	1404	396	6,165.72	28
12	1700	1349	351	5,465.07	26
13	1700	1320	380	5,916.60	29
14	1600	1297	303	4,717.71	23
15	1500	874	626	9,746.82	72
18	1500	1228	272	4,235.04	22
19	1400	1204	196	3,051.72	16
20	1400	1194	206	3,207.42	17
21	1300	1182	118	1,837.26	10
22	1300	1163	137	2,133.09	12
25	1200	636	564	8,781.48	89
26	1200	614	586	9,124.02	95
27	1100	605	495	7,707.15	82
28	1100	598	502	7,816.14	84
29	1000	577	423	6,586.11	73
Subtotal (July 4-29)			7037	$ 109,566.09	
TOTAL			21333	$ 332,154.54	

4

ESTIMATED ABSENCE CAUSED BY TORTIOUS ACTS AT PREMISES OF HAMILTON STANDARD



Source: P. Exhs. P2, Z2.

TABLE 4-A

HAMILTON STANDARD

DISCREPANCIES BETWEEN ESTIMATES OF MR. MOONEY AND DR. NORTHRUP

	Mooney Estimates	Northrup Estimates	Difference	Cost of Difference At $25.27 Per Absence	% of Difference
June					
9	1500	2030	530	$ 13,393.10	35
10	1500	1993	493	12,458.11	33
13	1500	1914	414	10,461.78	28
14	1500	1876	376	9,501.52	25
15	1300	1790	490	12,382.30	38
16	1200	1712	512	12,938.24	43
17	1100	1499	399	10,082.73	36
20	1000	1414	414	10,461.78	41
21	1000	1385	385	9,728.95	39
22	900	1329	429	10,840.83	48
23	900	1305	405	10,234.35	45
24	800	957	157	3,967.39	20
27	700	904	204	5,155.08	29
28	700	888	188	4,750.76	27
29	700	871	171	4,321.17	24
30	700	858	158	3,992.66	23
July					
1	600	508	92	2,324.84	15
Subtotal (June 9- July 1)			5817	$ 146,995.59	
4	600	523	77	1,945.79	15
5	600	507	93	2,350.11	18
6	600	506	94	2,375.38	19
7	600	502	98	2,476.46	20
8	600	501	99	2,501.73	20
11	600	500	100	2,527.00	20
12	600	487	113	2,855.51	23
13	600	471	129	3,259.83	27
14	600	457	143	3,613.61	31
15	600	221	379	9,577.33	171
August					
1	500	218	282	7,126.14	129
2	500	216	284	7,176.68	131
3	500	211	289	7,303.03	137
4	500	208	292	7,378.84	140
5	500	205	295	7,454.65	144
8	500	200	300	7,581.00	150
Subtotal (July 4- Aug. 8)			3067	$ 77,503.09	
TOTAL			8884	$ 224,498.68	